A

MENTERI KEWANGAN & ORS

v.

ZULLAIMY MUHAMMAD

B

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ANANTHAM KASINATHER JCA
MAH WENG KWAI J
[CIVIL APPLICATION NO: W-01-634-2010]
C 16 AUGUST 2012

ADMINISTRATIVE LAW: *Judicial Review - Certiorari - Application for - Locus standi - Forfeiture of vehicles for failure to furnish requisite approved permits - Whether respondent adversely affected by decision of*
D *forfeiture - Whether appellant aggrieved party - Whether respondent authorised by company to file for judicial review in his personal name*

The Director General of Customs Malaysia ('the second appellant') seized 16 vehicles, imported into the country by
E Gapemal Sdn Bhd ('Gapemal') and/or Persatuan Pengimport dan Peniaga Kenderaan Melayu Malaysia ('Pekema'), on the grounds that they were imported using false approved permits ('APs'). By a letter dated 8 October 2008, the second appellant informed the respondent that he had committed an offence under s. 133(1)(c)
F of the Customs Act 1967 ('the Act') and offered to compound the offence for the total sum of RM80,000. On 17 October 2008 the respondent accepted the offer to compound the offence and paid the required sum. Subsequently, on 7 November 2008, the respondent appealed to the second appellant for an extension of
G time to "mendapatkan semula kenderaan-kenderaan" and not to forfeit the 16 vehicles. The second appellant replied on the same date allowing the respondent 30 days from 7 October 2008 to furnish the required APs, failing which the vehicles would be forfeited to the government on 16 November 2008. The
H respondent sought judicial review when his appeal for the return of the vehicles under s. 129A of the Act was rejected. The High Court allowed the respondent's application and set aside the forfeiture order. Hence this appeal by the appellants on the grounds, *inter alia*: (i) that the respondent had no *locus standi* to
I file an application for judicial review; (ii) that the date of forfeiture was 16 November 2008 and not 17 October 2008 as wrongly

held by the learned judge and that the appellants had complied with s. 131(3)(b)(ii) of the Act; and (iii) that the respondent's appeal to the first appellant under s. 129 of the Act was defective.

Held (allowing appeal with no order as to costs)
Per Mah Weng Kwai J delivering the judgment of the court:

(1) The respondent had failed to come within the test as spelt out in the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* that for a person to be entitled to make an application for judicial review, he has to be a person who is adversely affected by the decision. In the instant case, the importers of the vehicles were Gapemal and/or Pekema and thus, Gapemal and/or Pekema being the "aggrieved party" ought to have filed for judicial review and not the respondent. Therefore the respondent did not have the necessary locus to file for judicial review. There was not an iota of evidence to even suggest that the respondent was authorised by the company to file for judicial review in his personal name. (para 13)

(2) The finding of fact by the learned High Court judge that the vehicles were forfeited on 17 October 2008 was an erroneous finding. A perusal of the documents and consideration of the events showed that the date of forfeiture was in fact 16 November 2008 ie after the expiry of 30 days notice given on 17 October 2008. The vehicles were only forfeited on 16 November 2008 when the respondent failed to furnish the required APs. As the second appellant had correctly given the respondent the requisite notice to furnish the APs within 30 days from 17 October 2008, the second appellant was in compliance with s. 131(3)(b)(ii) of the Act. (para 13)

(3) As the respondent had failed to furnish the second appellant with the required APs within the time stipulated, the order of *certiorari* ought not to have been granted. There was no breach of the "procedural fairness" rule committed by the appellants in this case. (para 13)

Bahasa Malaysia *Translation Of Headnotes*

Ketua Pengarah Kastam Malaysia ('perayu kedua') merampas 16 kenderaan yang diimport ke dalam negara oleh Gapemal Sdn Bhd ('Gapemal') dan/atau Persatuan Pengimport dan Peniaga Kenderaan Melayu Malaysia ('Pekema'), atas alasan bahawa ia

diimport menggunakan permit kelulusan ('AP') palsu. Melalui surat bertarikh 8 Oktober 2008, perayu kedua memberitahu kepada responden bahawa dia telah melakukan satu kesalahan di bawah s. 133(1)(c) Akta Kastam 1967 ('Akta') dan menawarkan kompoun bagi kesalahan tersebut dengan jumlah keseluruhan RM80,000. Pada 17 Oktober 2008 responden menerima tawaran kompaun bagi kesalahan tersebut dan membayar jumlah yang diperlukan. Kemudian, pada 7 November 2008, responden merayu kepada perayu kedua lanjutan masa untuk "mendapatkan semula kenderaan-kenderaan" dan supaya tidak melucut hak 16 kenderaan tersebut. Perayu kedua membalas pada tarikh yang sama membenarkan responden 30 hari daripada 7 Oktober 2008 untuk mengemukakan AP yang diperlukan, dan jika gagal kenderaan-kenderaan tersebut akan dilucut hak kepada kerajaan pada 16 November 2008. Responden memohon semakan kehakiman apabila rayuannya untuk pengembalian kenderaan di bawah s. 129A Akta tersebut ditolak. Mahkamah Tinggi membenarkan permohonan responden dan mengenepikan perintah pelucuthakkan. Maka rayuan ini oleh perayu-perayu atas alasan, antara lain: (i) bahawa responden tidak mempunyai *locus standi* untuk memfailkan permohonan semakan kehakiman; (ii) tarikh pelucuthakkan adalah 16 November 2008 dan bukan 17 Oktober 2008 seperti yang diputuskan secara salah oleh yang arif hakim dan bahawa perayu-perayu telah mematuhi s. 131(3)(b)(ii) Akta; dan (iii) bahawa rayuan responden kepada perayu pertama di bawah s. 129 Akta adalah cacat.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)

Oleh Mah Weng Kwai H menyampaikan penghakiman mahkamah:

(1) Responden tidak terangkum di bawah ujian yang dijelaskan di dalam kes *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* bahawa bagi membolehkan seseorang berhak membuat permohonan semakan kehakiman, dia perlu menjadi seseorang yang terjejas oleh keputusan tersebut. Di dalam kes ini, pengimport kenderaan-kenderaan tersebut adalah Gapemal dan/atau Pekema dan dengan itu Gapemal dan/atau Pekema sebagai "pihak yang terkilan" yang sewajarnya memfailkan semakan kehakiman dan bukan responden. Oleh demikian responden tidak mempunyai locus yang diperlukan untuk

memfailkan semakan kehakiman. Tidak ada sedikit pun keterangan untuk menyarankan bahawa responden diberikan kuasa oleh syarikat untuk memfailkan semakan kehakiman dalam kapasiti peribadinya.

(2) Dapatan fakta oleh yang arif Hakim Mahkamah Tinggi bahawa kenderaan-kenderaan tersebut dilucuthakkan pada 17 Oktober 2008 adalah dapatan yang salah. Penelitian dokumen-dokumen dan pertimbangan kejadian menunjukkan bahawa tarikh lucuthak adalah sebenarnya pada 16 November 2008 iaitu selepas tamat tempoh notis 30 hari yang diberikan pada 17 Oktober 2008. Kenderaan-kenderaan tersebut hanya dilucuthak pada 16 November 2008 apabila responden gagal mengemukakan AP yang diperlukan. Oleh sebab perayu kedua telah dengan betul memberikan responden notis yang diperlukan untuk mengemukakan AP dalam tempoh 30 hari dari 17 Oktober 2008, perayu kedua telah mematuhi peruntukan s. 131(3)(b)(ii) Akta.

(3) Oleh sebab responden telah gagal mengemukakan kepada perayu kedua AP yang diperlukan dalam tempoh yang ditetapkan, perintah *certiorari* tidak sepatutnya diberikan. Tidak ada kemungkiran peraturan "keadilan prosedur" yang dilakukan oleh perayu-perayu di dalam kes ini.

Case(s) referred to:

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Ors [2010] 6 CLJ 291 HC ***(dist)***

Mohamed Ismail v. Tan Sri Haji Osman Saat & Ors [1982] CLJ 553; [1982] CLJ (Rep) 581 HC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(foll)***

Legislation referred to:

Customs Act 1967, ss. 129, 131(3)(b)(ii), 133(1)(c)

Rules of the High Court 1980, O. 53 r. 2(4)

For the appellants - Noor Hisham Ismail; SFC
For the respondent - JR Ravendren; M/s JR Ravendren & Assocs

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: R3-25-177-2009]

Reported by S Barathi

A

JUDGMENT

Mah Weng Kwai J:

Brief Facts

B **[1]** In 2006, 16 vehicles were imported into the country by Syarikat Gapemal Sdn Bhd and/or Persatuan Pengimport dan Peniaga Kenderaan Melayu Malaysia (Pekema). The relevant Application/Permit To Tranship/Remove Goods Forms; Declaration of Goods Imported Forms; Invoices and Application for Import C Licence Forms are shown in the Rekod Rayuan from pp. 155 to 188. It will be noted that the names of the importer/applicant stated in these forms are Syarikat Gapemal Sdn Bhd and/or Pekema.

D **[2]** Between February and April 2006 the 2nd appellant seized the 16 vehicles on the ground that they were imported using false Approved Permits (APs).

[3] By letter dated 8 October 2008, the respondent was E informed by the 2nd appellant that investigations revealed that he had committed an offence under s. 133(1)(c) of the Customs Act 1967 ('the Act') of importing the vehicles without valid APs and an offer to compound the offence at RM5000 per vehicle was offered to the respondent (Rekod Rayuan pp. 245, 246). The F respondent was given 14 days to pay the total compound sum of RM80,000.

[4] On 17 October 2008 the respondent accepted the offer to compound the offence and paid the sum of RM80,000 to the Customs Department (Penerimaan Tawaran Compound kerana G melakukan kesalahan di bawah Akta Kastam 62/1967 at Rekod Rayuan p. 247).

[5] By letter dated 7 November 2008 the respondent appealed to the 2nd respondent for an extension of time to "mendapatkan H semula kenderaan-kenderaan" and not to forfeit the 16 vehicles (Rekod Rayuan p. 254).

[6] The 2nd appellant replied by letter dated 7 November 2008 (and not 7 October 2008 as mistakenly stated) allowing the I respondent 30 days from 17 October 2008 (the date the offence was compounded) to furnish the required APs failing which the 16 vehicles will be forfeited to the government on 16 November 2008 (Rekod Rayuan pp. 279 and 280).

[7] On 5 December 2008 the respondent appealed under s. 129A of the Act to the 1st appellant for the return of the vehicles (Rekod Rayuan pp. 255 - 257). The appeal was rejected by the 1st appellant on 19 March 2009 (Rekod Rayuan p. 259). A

[8] Being dissatisfied with the 1st appellant's decision the respondent applied for a judicial review. B

[9] On 1 September 2010, the learned High Court Judge allowed the respondent's application for *certiorari* and ordered *inter alia* the forfeiture order of 19 March 2009 be set aside. C

[10] The appellants being dissatisfied with the decision of the learned judge appealed to the Court of Appeal.

The Appellants' Grounds of Appeal

[11] In essence the appellants' appeal rests on three grounds namely: D

(i) the respondent has no *locus standi* to apply for judicial review as he was not the importer of the vehicles and neither was he authorised to do so on behalf of Gapemal Holding Sdn Bhd and/or Pekema; E

(ii) the date of forfeiture of the vehicles was on 16 November 2008 and not 17 October 2008 as wrongly held by the learned judge and that the appellants had complied with s. 131(3)(b)(ii) of the Act; and F

(iii) the respondent's appeal to the 1st appellant under s. 129 of the Act was defective.

Decision Of The Court G

[12] Upon reading the Rekod Rayuan, the written submissions of counsel for the appellants and the respondent and upon hearing counsel aforesaid, the court allowed the appeal with costs.

Grounds Of The Decision H

[13] The first issue - Whether the respondent had *locus standi* to file for judicial review

(i) The court is of the view that the respondent did not have the necessary locus to file for judicial review as he was not the importer of the vehicles. A perusal of the relevant import documents in the Rekod Rayuan from pp. 151 to 188 clearly I

shows that the importer of the vehicles were Gapemal Holding Sdn Bhd and/or Pekema. Rightly, Gapemal Holding Sdn Bhd and/or Pekema being the "aggrieved party" ought to have filed for judicial review and not the respondent. In his affidavit affirmed on 20 May 2009, the respondent stated that he was the Executive Director of Gapemal Holding Sdn Bhd from 11 June 1990 till 15 September 2006, when he resigned as a director of the company and that he is (now) the General Manager of Gapemal Holding Sdn Bhd. As at 28 August 2009 when the judicial review was filed the respondent was no longer a director of the company and could not have possibly acted on behalf of the company in that capacity. At best he was acting as a General Manager for and on behalf of the company and the application ought to have been made in the name of the company and not in the name of the respondent personally.

(ii) There is not an iota of evidence to even suggest that the respondent was authorised by the company to file for judicial review in his personal name. Further, there is absolutely no explanation given to link the respondent with Pekema, the joint and/or alternate importer of the vehicles.

(iii) Order 53 r. 2(4) of the Rules of the High Court 1980 ('RHC') provides that "any person who is adversely affected by the decision of any public authority shall be entitled to make the application".

(iv) Here, the person who is adversely affected by the decision of the 1st appellant is Gapemal Holding Sdn Bhd and/or Pekema and not the respondent who at the time of the application for judicial review was a General Manager, an employee of the company.

(v) In the Supreme Court case of *Government of Malaysia v. Lim Kit Siang & Another Case* [1988]1 CLJ 219; [1988] 1 CLJ (Rep) 63 Abdul Hamid CJ (Malaya) held that:

> *Locus standi* is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have *locus standi*, in effect standing to sue in a court of law, if that court recognizes his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff.

It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant.

(vi) While it is trite that an applicant for judicial review of the action of a public authority need only establish that he had a sufficient interest in the matter (see *Mohamed Ismail v. Tan Sri Haji Osman Saat & Ors* [1982] CLJ 553; [1982] CLJ (Rep) 581) unfortunately the appellant in this case was not clothed with the necessary locus to do so. Unlike the applicants in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Ors* [2010] 6 CLJ 291 the appellant personally did not fall within the category of "persons adversely affected". In the *Malaysian Trade Union Congress* case, the applicants were held to be persons adversely affected as each and every applicant was a paying consumer of water within the area covered by the Concession Agreement governing the water tariff for Selangor.

(vii) For the reasons stated above, the court is of the view that the appellant had failed to come within the test as spelled out in the recent case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 where the Federal Court held that for a person to be entitled to make an application for judicial review he has to be a person who is adversely affected by the decision. In the *WRP Asia Pacific Sdn Bhd* case, it was held on the facts that any discontinuance of the electricity supply would cause untold grief to the appellant's business. Hence, it was held that the appellant was not a mere busybody but a person that would be adversely affected by the decision of the respondent.

(viii) The court is of the view that the learned judge misdirected himself when he failed to consider the lack of locus on the part of the respondent and proceeded to grant the order of *certiorari* to quash the decision of the 1st respondent dated 19 March 2009 and to grant the declaratory order that the forfeiture of the vehicles was *ultra vires* s. 131(3)(b) of the Act.

[14] The second issue - date of the forfeiture order

(i) The second issue to be determined by the court was the actual date of forfeiture of the vehicles.

(ii) It was the respondent's case that the vehicles were forfeited on 17 October 2008, that is, on the day the offence was compounded itself. The respondent placed reliance on the paragraph "kenyataan barang-barang 16 unit kereta seperti di Lampiran A dilucuthak kepada Jabatan" appearing in the Penerimaan Tawaran Kompaun kerana melakukan kesalahan di bawah Akta Kastam 62/1967 Form (Rekod Rayuan p. 247) in support of his contention that the appellants had failed to give notice of 30 days to the respondent before the forfeiture.

(iii) The learned judge in para. 7 of his grounds of judgment (Rekod Rayuan p. 26) made a finding of fact that the vehicles were forfeited on 17 October 2008 (and not 17 October 2009 as wrongly stated in the paragraph) that is, on the day the "Surat Tawaran Kompaun No. 380953 bertarikh 17 October 2008 was issued. Unfortunately this was an erroneous finding of fact made by the learned judge. A perusal of the following documents and consideration of the events will show that the date of forfeiture was in fact 16 November 2008 that is, after the expiry of 30 days notice given on 17 October 2008:

(a) On 8 October 2008 an offer to compound the offence under s. 133(1)(c) of the Act within 14 days was made to the respondent (Rekod Rayuan pp. 128 and 129);

(b) The respondent paid the sum of RM80,000 on 17 October 2008 (Rekod Rayuan p. 247);

(c) On the same day 17 October 2008, the respondent wrote a letter to the 2nd appellant requesting for the return of the vehicles;

(d) A letter dated 7 November 2008 (not 7 October 2008 as wrongly stated therein) (Rekod Rayuan pp. 279 and 280) was sent to the respondent confirming that the compound fee had been paid on 17 October 2008 and that the respondent was given a period of 30 days from 17 October 2008 to furnish the Import Licence (APs) for the 16 vehicles, failing which the said vehicles would be forfeited on 16 November 2008;

(e) The respondent applied to the 1st appellant by letter dated 5 December 2008 (Rekod Rayuan pp. 255 to 257) for the return of the vehicles under s. 129 of the Act, which provides "that an application shall be made before the expiration of one calendar month from the date on

which the said goods are forfeited". If the respondent maintains that the vehicles were forfeited on 17 October 2008, then the application made on 5 December 2008 would have been out of time. In all likelihood and the court accepts on a balance of probabilities, that the letter of appeal was in fact written within time after the vehicles were forfeited on 16 November 2008.

(iv) From the above sequence of events, it can be clearly seen that the vehicles were only forfeited on 16 November 2008 when the respondent failed to furnish the required APs. If the letter in the Rekod Rayuan at pp. 277 and 280 was in fact dated 7 October 2008, it would have been ridiculous for the 2nd appellant to have stated in advance in para. 3 therein that "pihak tuan telahpun membayar denda kompaun yang ditawarkan pada 17 October 2008 ...". Further, in line 3 of para. 4 of the said letter, it was clearly stated by the 2nd appellant that "jika gagal 16 unit kereta ini akan terlucuthak kepada jabatan mulai 16hb November 2008".

(v) The court is of the view that as the 2nd appellant had correctly given the respondent the requisite notice to furnish the APs within 30 days from 17 October 2008, the 2nd appellant was in compliance with s. 131(3)(b)(ii) of the Act which provides:

s 131(3) On the payment of such sum of money:

(b) any property seized shall be released and no further proceedings shall be taken against such property except that -

(ii) if the property seized consists of prohibited goods, such goods of the amount secured under paragraph (a) or (b) of subsection (1) of section 115 or the amount realized by sale under paragraph (c) of the said subsection (1), as the case may be, shall be forfeited:

Provided that where the prohibition is conditional upon a licence being issued, a senior officer of customs may release such goods if a licence is issued by any relevant authority within thirty days from the date such sum of money is paid.

A And as the respondent had failed to furnish the 2nd appellant with the required APs within the time stipulated, the order of *certiorari* ought not to have been granted. There was no breach of the "procedural fairness" rule committed by the appellants in this case.

B

Conclusion

[15] The court is of the view that notwithstanding the offer to compound the offence under s. 131 of the Act was made to the respondent as he was personally liable for the offence, and the C compound fee was paid in the personal name of the respondent, the application for judicial review ought to have been made by Gapemal Holding Sdn Bhd and/or Pekema as the importer/ consignee of the vehicles and not the respondent who was only the General Manager of Gapemal Holding Sdn Bhd at the material D time. Unfortunately the issue of locus was not considered by the learned judge in his grounds of judgment.

[16] As the date of forfeiture was on 16 November 2008 and not 17 October 2008, after the expiry of 30 days from the date the E offence was compounded on 17 October 2008, the appellants were not in breach of the provisions of s. 131(3)(b)(ii) and had not acted *ultra vires* the Act.

[17] In the result, the appeal was allowed with no order as to F costs and the order of the High Court was set aside.

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